IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision: 12.10.2006.

Subhash Chander Vs. Anil Kumar Gabba

CORAM: **Hon'ble Mr. Justice Virender Singh**
Hon'ble Mr. Justice A.N. Jindal

Present: Mr. Harsh Aggarwal, Advocate, for the appellant.

Virender Singh, J.

Respondent Anil Kumar Gabba has earned acquittal vide impugned judgment of Judicial Magistrate Ist Class, Jalandhar dated 28.1.2006 in a complaint filed by the appellant/complainant under Section 138 of Negotiable Instrument Act (for short 'the Act'). Aggrieved by the said judgment, the appellant has filed the instant appeal along with Misc. Application under Section 378 (4) read with Section 482 of the Code of Criminal Procedure for grant of special leave to appeal.

We have heard Mr. Harsh Aggarwal, learned counsel for the appellant and with his assistance gone through the impugned judgment minutely.

Mr. Aggarwal contends that the cheque dated 6.1.2003 for

Rs.50,000/- was issued by the respondent/accused in favour of the appellant which was dishonoured by the Bank due to "insufficient funds". Thereafter, a notice was issued within the stipulated period after the receipt of the memo of the bank, but the respondent did not make the payment. According to learned counsel once all the provisions of the Act were complied with, the respondent/accused had no escape as he had dishonest intention from the very beginning.

Mr. Aggarwal then contends that even if the cheque is issued as a security and it is dishonoured, it amounts to committing of offence punishable under Section 138 of the Act. He states that the view of the learned trial Court in this regard is not sustainable. He then contends that the rejection of the complaint by the learned trial Court on the issue of accruing of cause of action is also bad in the eye of the law. Primarily on the aforesaid submissions, Mr. Aggarwal prays for grant of special leave to appeal.

May be that we agree with the contention of Mr. Aggarwal with regard to the controversy about the issuance of the cheque as a security or for clearance of the existing debts, still in our considered view the appellant cannot improve his case with regard to limitation for filing the complaint. In the instant case the cheque is dated 6th January, 2003 issued by the respondent-accused in favour of the appellant-complainant to be drawn on State Bank of Patiala. After its presentation, the same was returned with the remarks "insufficient funds". The appellant, as his

case is, received the information on 15.2.2003 and thereafter sent a legal notice on 28.2.2003 but the respondent failed to make the payment within the statutory period of 15 days from the date of receipt of notice. The learned trial Court has observed in para 13 of the impugned judgment that the appellant/ complainant has concealed the material fact from the court to the effect that the cheque was presented twice. He had not pleaded the said fact in the complaint whereas he admitted it in his cross-examination. For reference the said para is reproduced as under:-

> "13. This apart, the complaint has concealed the material fact from the court to the effect that the impugned cheques was presented in the court twice. The complainant has nowhere pleaded the aforesaid fact in the complaint whereas he admitted this fact in his cross-examination as CW-1 by deposing on oath that he presented the impugned cheques in the bank twice. Moreover, the complainant has half heartedly admitted about the issuance of requisite notice on the dishonour of the impugned cheque for the first time by cleverly deposing in his cross examination as CW1 to the effect that <u>on the dishonour of cheque for the first time he had given written intimation to the accused in this regard</u> particularly when it is not the case of the complainant that he presented the cheque for second time at the instance of the accused, rather he stated in his cross-examination that it is correct that accused never asked him to present the impugned cheque in the bank. In the light of totality of the circumstances, adverse inference will be drawn against the complainant that he had served the requisite legal notice upon the accused on the dishonour of the cheque for the first time because had the complainant not been served the

requisite legal notice upon the accused on the dishonour of the cheque on first time, in that case, he must have been pleaded that the impugned cheque was presented in the bank twice and also produced on record the abovesaid writing. It is well settled that if a party concealed the material facts from the court and with-hold the best available evidence necessary to determine the question of fact, adverse inference will be drawn against that party. Since the complainant has failed to file the complaint on the basis of cause of action which had arisen under proviso to clause (c) of section 138 of the Act when cheque was dishonoured for the first time and notice issued, therefore, the present complaint is not maintainable filed on the basis of presentation of the impugned cheque second time and issuing of notice on the dishonour of that cheque being time barred. In this regard this court is fortified by the pronouncement of our Hon'ble High Court reported at 2005 (2) RCR (Criminal) page 142 wherein it has been held that:-

> "Negotiable Instrument Act, Section 138 (c)- Notice issued to accused but complaint not filed-Cheque again presented and again dishonoured-Second notice demanding payment issued to accused-Non-payment by the accused-Complaint filed on the basis of second notice-Complaint not maintainable-In fact limitation ground of first cause of action was available when complaint on basis of second notice was filed-Complaint could not be treated on basis of first cause of action."

This court is also fortified by the pronouncement of Hon'ble Apex Court reported at 2005 (2) RCR (Criminal) 872 wherein it has been held that:-

> " Negotiable Instrument Act, Sections 138 and 142-Dishonour of cheque-Limitation to file complaint-Cause of action-Demand notice served upon drawer-Cause of action to file complaint arose on service of-notice but no complaint filed within one month as drawer promised to make payment-Payment promise-Cheque presented for the second time but again dishonoured-Second notice of demand served on drawer-Service of second notice does not give fresh of cause of action-Cause of action within the meaning of section 142 (c) arises-and can arisen-only once-Complaint under section 138 not maintainable."

This court is also supported by the another pronouncement of our Hon'ble High Court reported at 1994 (2) Civil Court Cases page 246 wherein it has been held that:-

> "Negotiable Instrument Act, 1881, S.138-Dishonour of cheque-Notice issued-Cheque again presented Cheque again dishonoured-Notice again issued and on failure to make the payment within 15 days of the service of notice complaint filed-Complaint is time barred."

Mr. Aggarwal is not in a position to controvert the impugned judgment at least on facts and, therefore, we are in agreement with the aforesaid view already taken by the learned trial Judge. In our firm view, the impugned judgment does not suffer from any infirmity on any count warranting our interference.

Resultantly, finding no substance in the instant appeal,

Criminal Misc. No.254-MA of 2006 for granting special leave to appeal is hereby dismissed.

(Virender Singh)
Judge

(A.N. Jindal),
Judge

October 12, 2006
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